RECORD AND BRIEFS

No. 10-1491

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IN THE

Supreme Court of the United States

ESTER KIOBEL, individually and on behalf of her late husband, Dr. Barinem Kiobel, *et al.*,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF OTP BANK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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SUPPLEMENTAL BRIEF OF OTP BANK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

OTP Bank (OTP) is the largest private bank in Hungary. Although it has negligible connections to the United States, OTP is a defendant in *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank et al.*, No. 11-2386, a case brought, *inter alia*, under the Alien Tort Statute (ATS) and currently pending in

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have filed with the Clerk of the Court letters consenting to the filing of all *amicus* briefs.

the U.S. Court of Appeals for the Seventh Circuit. Plaintiffs in that case allege that a predecessor of OTP, together with the Hungarian Central Bank, Magyar Nemzeti Bank, and the predecessors of two other private banks named as defendants, were complicit in the Nazi genocide of the Hungarian Jewish population in 1944-45. Plaintiffs seek over $75 billion in actual and punitive damages, almost 40 percent of the gross national product of the Republic of Hungary. The district court denied the private banks' motions to dismiss on grounds of, among others, political question, lack of personal jurisdiction, and lack of subject matter jurisdiction under the ATS, as well as the Central Bank's motion to dismiss due to foreign sovereign immunity. *See Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp. 2d 689 (N.D. Ill. 2011).

Plaintiffs in OTP's case have submitted an *amicus curiae* brief in this Court in support of Petitioners in the present case, arguing that this Court should recognize claims under the ATS against non-U.S. parties for conduct in foreign sovereign territory (as in OTP's case) so long as the claims allege offenses for which universal jurisdiction is permitted under international law. *See* Supplemental Brief of *Amici Curiae* Victims of the Hungarian Holocaust in Support of Petitioners (*Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, filed June 12, 2012). OTP believes that its case illustrates the difficult and contentious issues that arise even in cases alleging such wrongs, and that the ATS was not intended to reach, and should not be read to extend to, these circumstances. OTP submits this *amicus curiae* brief to provide this Court with specific examples and context showing the difficulties and international tensions associated with universal jurisdiction cases under the ATS.

SUMMARY OF ARGUMENT

While there are egregious international wrongs that are universally condemned, it does not follow that U.S. courts have or should exercise universal jurisdiction over civil actions involving such offenses when they are alleged to have been committed in foreign sovereign territory, by foreign nationals, against persons who were not U.S. citizens at the time the offenses occurred.[2] Expanding federal courts' jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), in such a radical manner would abandon the cautious and restrained approach applied to ATS claims by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (finding that the foreign relations consequences of ATS claims "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"). Such a broad expansion would conflict with the careful distinctions that Congress and the Executive Branch have made regarding such wrongs. *See, e.g.*, Genocide Conven-

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[2] *Amicus* takes no position here on the principal arguments of Respondent (a) that the presumption against extraterritoriality, see *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), precludes ATS jurisdiction over extraterritorial claims, and (b) that the *Charming Betsy* canon of statutory interpretation, see *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), precludes the assertion of civil universal jurisdiction under the ATS as contrary to international law. *See* Supplemental Brief for Respondents (*Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, filed August 1, 2012). *Amicus* respectfully submits here that, even if this Court does not accept those arguments, it should nonetheless decline to extend ATS jurisdiction to acts of non-U.S. parties done in foreign sovereign territory and having no connection with the United States, and therefore affirm the judgment below.

tion Implementation Act, 18 U.S.C. §§ 1091-92 (providing for criminal prosecution of genocide but specifically excluding private civil remedies); War Crimes Act, 18 U.S.C. § 2441 (limiting the scope of war crimes offenses under the Act to those in which a U.S. person or a member of the U.S. armed forces was a perpetrator or victim, and failing to provide for civil remedies); Torture Victim Protection Act, 28 U.S.C. § 1350 Note (limiting private rights of action for torture and extrajudicial killing to suits against natural persons (excluding entities) and not providing for secondary liability). *See also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003) (noting that the Executive Branch has addressed Holocaust-era claims by entering into executive agreements establishing administrative claims procedures rather than by supporting civil litigation as a remedy).

Using the ATS as a vehicle for redressing claims by non-U.S. plaintiffs against non-U.S. defendants for acts committed in foreign sovereign territory would go beyond the purpose and scope of the ATS at the time of its adoption. The ATS's purpose was to provide a remedy for international law violations for which the United States would be held responsible, and thus to avoid giving offense to other nations. In 1789, the law of nations did not recognize any ability of a nation to punish conduct in foreign sovereign territory other than the conduct of its own nationals. Moreover, in 1789, Article III of the U.S. Constitution was not understood to provide jurisdiction over common law claims between aliens with no connection to the United States, and the ATS would have been construed accordingly. *See Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 824-26 (9th Cir. 2011) (en banc) (Ikuta, J., dissenting), *petition for cert. filed* Nov. 23, 2011.

As a result, regardless of whether international law recognizes the United States' ability to entertain such claims, the ATS does not provide federal courts with statutory authority to do so.

As to the first point, extending ATS jurisdiction to cases lacking any U.S. nexus would involve U.S. courts in contentious issues of international law and international relations. The alleged presence of universal wrongs provides no assurance of international consensus about the disposition of particular cases. To the contrary, while universal offenses may be widely recognized in the abstract, whether particular conduct falls within the definition of a universal offense will often be subject to sharp disagreement. Further, even if the specific legal standards of universal offenses are agreed, their application to disputed facts will often be highly contentious. For example, although genocide is in the abstract universally condemned, what conduct constitutes genocide, and whether that conduct actually occurred, implicates highly sensitive and difficult questions.

These disagreements are multiplied where, as is common in ATS litigation, the defendant is not the primary wrongdoer and the claims rest on secondary liability. While universal jurisdiction may be accepted against primary wrongdoers, the extent to which it extends to persons who are not directly responsible and who may not share the intent or culpability of the primary actor, is not agreed.

Most importantly, even where culpability is agreed, the appropriate remedy may be strongly disputed. The choice among U.S.-style civil litigation, criminal prosecution, negotiated settlements, truth-and-reconciliation processes and other local remedies is a

value-laden one that implicates international relations as closely as does the determination of liability.

These difficulties are especially acute and pose special challenges for U.S. foreign relations where, as in the present case, neither the claims nor the parties have any material connection to the United States and U.S. involvement rests upon an assertion of universal jurisdiction. In such circumstances, the United States is in the position of purporting to decide these contested matters, not merely for itself, but for the entire world. As a result, U.S. courts risk substantial disruption of foreign relations by asserting worldwide jurisdiction under the ATS, even as applied to allegations of universally condemned wrongs.

Second, for these reasons, the U.S. Executive and Legislative Branches have been cautious in accepting universal jurisdiction over offenses having no connection to the nation exercising jurisdiction. Congress has legislated narrowly with regard to the prosecution of offenses potentially subject to universal jurisdiction under international law. For example, in the Genocide Convention Implementation Act, 18 U.S.C. §§ 1091-92, Congress provided for criminal prosecution of genocide but specifically excluded private civil remedies. In the War Crimes Act, 18 U.S.C. § 2441, Congress limited the scope of offenses under the Act to those in which a U.S. person or a member of the U.S. armed forces was a perpetrator or victim, and did not provide for civil remedies. In the Torture Victim Protection Act, 28 U.S.C. § 1350 Note, while providing a civil damages remedy for torture and extrajudicial killing, Congress limited potential defendants to natural persons (excluding entities) and did not provide for secondary liability. Thus,

even though genocide, war crimes and torture may be considered universal jurisdiction offenses, civil claims against non-resident corporations of the type Petitioners seek to bring under the ATS in the present case could not be brought under any of Congress' statutes specifically addressing those offenses. Similarly the Executive Branch has entered into executive agreements with Austria, France, Germany and other countries establishing administrative claims procedures as a mechanism for redressing Holocaust-era claims. In connection with these agreements, the Executive Branch has specifically rejected the pursuit of civil litigation as an appropriate remedy, and this Court has found that competing efforts to foster a litigation remedy are preempted. *See Garamendi*, 539 U.S. at 428.

Further, the U.S. Executive Branch has resisted other nations' application of universal jurisdiction over persons and events having no connection to those nations. For example, the United States aggressively protested Belgium's criminal universal jurisdiction statute as applied to U.S. persons for acts having no connection to Belgium, and in light of these objections, the law was amended to limit potential defendants to Belgian citizens or residents. *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1, 29-32 (2011).

Consistent with the caution shown by the U.S. Congress and Executive Branch, the international law of universal jurisdiction remains tentative and underdeveloped. Instances of nations exercising universal jurisdiction in specific cases are rare and often involve events having some connection to the

nation exercising jurisdiction (such as residency of the defendant). *See* Langer, *The Diplomacy of Universal Jurisdiction*, at 11-50; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. 81, 136-51 (2001). *See also Recent Legislation*, 125 Harv. L. Rev. 1554, 1554-55 (2012) (noting a "trend of states' ... tightening universal jurisdiction legislation to respond to the unique challenges and international relations implications these prosecutions present."). Adopting universal jurisdiction through the ATS would put U.S. courts at the forefront of developing the international law and practice of universal jurisdiction in an area where the U.S. Congress and Executive Branch, and the international community as a whole, have taken only cautious and incremental steps.

Third, recognizing ATS jurisdiction over the acts of non-U.S. persons in foreign sovereign territory would be contrary to the ATS's purpose and beyond the common understanding of its scope at the time it was enacted. The purpose of the ATS was to provide a remedy for international law violations for which the United States would be held responsible by foreign nations and to shield the foreign relations of the United States from international controversy. *See Sosa*, 542 U.S. at 715-20; *Rio Tinto*, 671 F.3d at 800-02 (Kleinfeld, J., dissenting); *id.* at 824-26 (Ikuta, J., dissenting). Applying the ATS to acts of non-U.S. persons in foreign sovereign territory would be contrary to this purpose. The United States has no general obligation to provide a remedy for such non-U.S. acts, and doing so will enhance rather than mitigate international discord. That is so even where the acts are alleged to be universal jurisdiction

offenses. As discussed, litigation of universal jurisdiction offenses raises a host of contentious issues.

Moreover, the ATS's statutory grant of jurisdiction at the time the ATS was enacted would not have been understood to encompass the acts of non-U.S. persons in foreign sovereign territory. In 1789, the law of nations did not recognize any ability of a nation to punish conduct in foreign sovereign territory other than the conduct of its own nationals. While there was criminal universal jurisdiction over piracy, piracy by definition occurred only on the high seas and not in the territory of any sovereign. Moreover, in 1789, Article III of the U.S. Constitution was not understood to provide jurisdiction over common law claims between aliens with no connection to the United States, and the ATS would have been construed accordingly. *See Mossman*, 4 U.S. at 14 (1800) (construing the 1789 Judiciary Act's grant of jurisdiction "where ... an alien is a party" to conform to Article III limits for diversity jurisdiction, and thus to preclude jurisdiction over suits involving only aliens); *Rio Tinto*, 671 F.3d at 829-34 (Ikuta, J., dissenting) (finding, on the basis of *Mossman*, that the ATS would not have been read to encompass most alien-against-alien suits in 1789).

In sum, recognition of universal jurisdiction under the ATS would involve U.S. courts in contentious cases having no connection with the United States, would require U.S. courts to take the lead in an area where the U.S. Congress and Executive Branch have acted narrowly and cautiously, and would extend ATS jurisdiction in ways not intended by Congress in enacting the ATS.

ARGUMENT

I. Extending ATS Jurisdiction to the Acts of Non-U.S. Persons in Foreign Sovereign Territory Would Involve U.S. Courts in Contentious Issues of Foreign Policy, Even if Limited to "Universal Jurisdiction" Offenses

Petitioners and their *amici curiae* argue that judicially extending civil jurisdiction under the ATS to non-U.S. persons for acts in foreign sovereign territory would not implicate sensitive issues of international relations so long as the alleged acts in question constitute universal jurisdiction crimes under international law. That is not so, as illustrated by the claims brought against OTP and its co-defendants. The alleged presence of universal wrongs provides no assurance of international consensus about the disposition of particular cases because substantial disputes will remain over the legal standards, fact-finding, scope of liability and remedies in particular cases.

First, even if universal jurisdiction over certain heinous offenses is widely recognized in the abstract, the legal standards applicable to particular conduct will often be subject to sharp disagreement. While there is broad consensus that genocide is a universal wrong, for example, there is much disagreement over what constitutes genocide. In OTP's case, plaintiffs allege that the Hungarian Central Bank and predecessors of OTP and its private co-defendants committed "genocide" or "aiding or abetting genocide." Despite these labels, nowhere do plaintiffs allege facts showing that OTP (or the other defendants, or any predecessors) actually killed or assisted in killing anyone. Instead, plaintiffs allege that 1944

Hungarian laws required Hungarian Jews to deposit all assets in Hungarian banks, and that after the war, the assets were not returned. The gravamen of the complaint is wrongful "continued retention" of assets after the war and up to the present day, as plaintiffs' complaint repeatedly states. Neither plaintiffs nor the district court were able to cite any international authorities that wrongful retention of assets may constitute genocide. Nonetheless, the district court held that plaintiffs had stated a claim under the ATS for genocide. *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp. 2d 689, 693-694 (N.D. Ill. 2011). As OTP's case illustrates, in asserting universal jurisdiction under the ATS, U.S. courts would be purporting to resolve sensitive issues regarding the definition of universal offenses for the entire world.

Second, even if the specific legal standards of a universal wrong are agreed, their application to disputed facts will often be subject to intense disagreement. For example, many governments have been accused, rightly or wrongly, of genocide of portions of their population – charges which many of them deny. *See* R.J. Rummel, *Death by Government* 4 (1994) (noting probable instances of genocide in the 20th century). Contrary to the common Western view, Turkey takes the position that the events in Turkey in 1915 did not constitute the genocide of Turkey's Armenian population. *See Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076-77 (9th Cir. 2012) (en banc) (finding that "Turkey expresses great concern over the issue [of the characterization of the events of 1915], which continues to be a hotly contested matter of foreign policy around the world."); *see also* Peter Baker, *Obama Marks Genocide Without Saying the Word,* N.Y. Times, Apr. 25, 2010,

at A10 (noting that President Obama was careful to avoid using the word "genocide" during a commemorative speech in an attempt to "avoid alienating Turkey, a NATO ally, which adamantly rejects the genocide label"). Thus, adopting universal jurisdiction under the ATS would place U.S. courts at the forefront of fact-finding in some of the most sensitive and contentious historical disputes.[3]

Third, ATS litigation of universal jurisdiction disputes will often be especially contentious and difficult because the defendants are often not the primary wrongdoers and the claims rest on some form of secondary or derivative liability. Even if the primary wrong is widely recognized as a universal offense, the question of how far and under what circumstances secondary liability should extend is likely to be a disputed one. For example, it is unsettled to what extent international law recognizes aiding and abetting liability, but in any event there does not appear to be a consensus in international practice that aiding and abetting a universal wrong is itself subject to universal jurisdiction. *See* Michael D. Ramsey, *International Law Limits on Investor Liability in*

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[3] Moreover, recognizing U.S. courts' authority to resolve and remedy such global historical disputes would leave the United States with no basis to object if other nations' courts asserted similar authority to sit in judgment of our own historical wrongs. *See Rio Tinto*, 671 F.3d at 816-17 (Kleinfeld, J., dissenting) ("There could be a class action ... [in a foreign court] brought by a Cherokee against descendants of those who obtained Cherokee land when President Jackson's administration forced their ancestors to leave their homes for the West. A foreign court could entertain a class action on behalf of African-Americans against American banks whose corporate ancestors profited from interest on loans for the purchase of American slaves").

Human Rights Litigation, 50 Harv. Int'l L.J. 271, 318-20 (2009). To the contrary, international authority indicates that aiding and abetting is often regarded as a less culpable offense than primary liability. *See Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, paras.181-82 & n. 291 (ICTY, Appeals Chamber, Feb. 25, 2004) (finding that conviction for aiding and abetting rather than as a principal required a reduction in the defendant's sentence as a result of a conviction for a lesser offense); *cf. Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994) (finding that Congress' creation of primary liability under the Securities Exchange Act of 1934 did not imply liability for aiding and abetting). Further, because ATS litigation often involves corporations and other entities as defendants, difficult issues exist as to attribution of liability to non-natural persons and among related enterprises. For example, in OTP's case, liability is sought against OTP, which even as alleged was not founded until 1949. OTP is alleged to be a successor of a bank that existed in 1944. OTP denies that it is, in fact or law, such a successor. Extending ATS liability to acts of non-U.S. persons in foreign sovereign territory would require U.S. courts to decide these contentious issues, not just for U.S.-related persons and offenses (where U.S. law would reasonably apply), but for the whole world.

Fourth, even where culpability of a particular actor is widely accepted, there may be sharp disagreements over the appropriate remedy. U.S.-style civil litigation, with broad contentious private-party-driven discovery and large monetary awards enhanced by punitive damages, and without the check of Executive Branch prosecutorial discretion, is only one model, and one that may be objectionable to countries

with more immediate interests in the wrongs. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2885 (2010) (discussing potentially contentious variations in procedures and remedies across jurisdictions). *See also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003) (contrasting the U.S. federal government's pursuit of a negotiated settlement of certain Holocaust-era claims with California's support of a remedy through civil litigation, and finding California's remedy preempted as conflicting with the federal policy on remedies). For example, with regard to claims arising from the Hungarian Holocaust, Hungary has undertaken its own remedial programs. Article 27 of the 1947 Peace Treaty between Hungary and the United States and other Allied Forces included a "fair compensation" provision and, after a certain time, required Hungarian property owners to pursue claims through special organizations established for that purpose. Treaty of Peace with Hungary, 41 U.N.T.S. 135, Art. 27 (1947). Since 1994, Hungary has adopted numerous legislative acts implementing Article 27, including legislation establishing the Jewish Heritage of Hungary Public Endowment. Plaintiffs in OTP's case attack Hungary's compensation measures as inadequate, thus bringing into question not only actions of long ago but also the actions and motives of the current Hungarian government.

In sum, Petitioners and their *amici* are wrong to suggest that recognizing universal jurisdiction under the ATS would raise no sensitive international issues. To the contrary, these cases are likely to be among the most sensitive and difficult of all: there will be disputes over what constitutes a universal wrong; over whether the alleged universal wrong occurred; over the extent of liability beyond the

primary actor; and over the appropriate remedy. Moreover, because universal jurisdiction claims involve allegations of the most heinous acts, a finding of liability is likely to have repercussions far beyond the particular parties to the litigation. Where the wrong occurs in foreign sovereign territory and neither the wrong nor the wrongdoer has any connection with the United States, foreign nations are likely to be especially sensitive about the United States undertaking to decide these issues. *See F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (concluding that federal courts should "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.").

This is not to say, of course, that genocide or other universal wrongs should not or cannot be punished, including in the United States. As discussed in the next section, U.S. courts are empowered to hear universal jurisdiction cases in certain circumstances under specific congressional statutes. And where the offense or the wrongdoer has a substantial nexus with the United States, U.S. courts' exercise of jurisdiction and resolution of these matters under the ATS is likely to raise fewer international objections.[4]

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[4] For example, in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697-98 (2004), which involved allegations of wrongdoing at least in part occurring in Mexico, the non-citizen defendant was an agent of the U.S. government, and thus the U.S. had a strong interest in the case. Similarly, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which involved wrongdoing in Paraguay, the non-citizen defendant was a temporary U.S. resident. These cases are materially distinct from the claims presented here (and in OTP's case), which involve only the acts of non-resident corporations with minimal connections to the United States.

II. Adopting Universal Jurisdiction under the ATS Would Conflict with the Approach of the U.S. Congress and Executive Branch, which Have Proceeded Cautiously with Regard to Universal Jurisdiction

Reflecting the potential difficulty and contentiousness of universal jurisdiction cases, Congress and the Executive Branch have proceeded cautiously with respect to universal wrongs. Judicial adoption of universal jurisdiction under the ATS would conflict with the caution shown by other branches and put U.S. courts at the forefront of an unsettled and evolving area of international law.

Most importantly, Congress has acted narrowly with respect to the assertion of universal jurisdiction. Congress has enacted several statutes addressing particular universally condemned offenses, but in none of these instances has Congress embraced the full extent of universal jurisdiction that Petitioners would have this Court create under the ATS. For example, in the Genocide Convention Implementation Act, Congress provided for criminal prosecution of genocide but specifically excluded private civil remedies. *See* 18 U.S.C. § 1091 (providing criminal penalties for genocide); 18 U.S.C. § 1092 (providing that "[n]othing in this chapter shall be construed as ... creating any substantive or procedural right enforceable by law by any party in any proceeding").[5]

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[5] By choosing criminal but not civil liability, Congress sent a strong signal that it wanted the Executive Branch and not private litigants to control the bringing of claims. *See also* Human Rights Enforcement Act of 2009, 28 U.S.C. § 509B (establishing a section within the Department of Justice dedicated to criminal enforcement of international human rights,

In the War Crimes Act, 18 U.S.C. § 2441, Congress limited the scope of offenses under the Act to those in which a U.S. national or a member of the U.S. armed forces was a perpetrator or victim. Congress also made no general provision for a civil cause of action for war crimes. In the Torture Victim Protection Act, 28 U.S.C. § 1350 Note, while providing a civil damages remedy for torture and extrajudicial killing, Congress limited potential defendants to natural persons, see *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), required exhaustion of local remedies, see 28 U.S.C. § 1350 Note, § 2(b), and did not provide for secondary liability.

Thus, even though genocide, war crimes and torture are generally regarded as universal wrongs, civil claims of the type Petitioners ask this Court to recognize in the present case (that is, claims against non-resident corporations based solely on universal jurisdiction) could not be brought under any of Congress' statutes specifically addressing those offenses. For example, in OTP's case, while plaintiffs allege genocide, they specifically disclaim reliance on the Genocide Convention or the Genocide Convention Implementation Act to provide a cause of action (as they must in light of 18 U.S.C. § 1092), although they

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including genocide, torture, and war crimes, and requiring the Attorney General to consult with the Secretary of State and the Secretary of Homeland Security, as appropriate, in connection with bringing enforcement actions). Recognizing a parallel civil action under the ATS would therefore significantly alter the enforcement scheme Congress selected. *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1, 45 (2011) (discussing importance of Executive Branch participation and other "coordinating mechanisms" in prosecution of universal jurisdiction offenses).

rely on the Act's definition of genocide. Instead, by suing under the ATS, they ask U.S. courts to create a federal common law cause of action precisely paralleling the sort of civil damages claim that Congress specifically precluded under the Act itself. *See Holocaust Victims of Bank Theft*, 807 F. Supp. 2d at 693.

Like Congress, the U.S. Executive Branch has acted cautiously with respect to universal jurisdiction. As noted, the Executive Branch has favored negotiated settlements and administrative remedies over civil litigation in connection with Holocaust-era claims. *See Garamendi*, 539 U.S. at 428. In addition, the Executive Branch has resisted broad claims of universal jurisdiction over U.S. persons by other nations. For example, in 2003, private parties brought suit in Belgium against former U.S. President George H.W. Bush for war crimes based on U.S. operations in Iraq, under a Belgian law that allowed claims for certain universal offenses to be brought in Belgian courts without any required nexus to Belgium. The United States strongly protested, and Belgium modified the law to limit it, among other things, to defendants who are nationals or residents of Belgium. *See* Langer, *The Diplomacy of Universal Jurisdiction*, 105 Am. J. Int'l L. at 29-32. U.S. courts' adoption of universal jurisdiction under the ATS would conflict with the U.S. position by allowing the same kinds of claims to be brought in U.S. courts against the nationals of other countries for acts unrelated to the United States.

The United States' cautious approach to universal jurisdiction reflects universal jurisdiction's unsettled and evolving place within international law. Apart from piracy, actual assertions of universal juris-

diction by national courts lack an established tradition. *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. 81, 136-51 (2001) (finding only scattered state practice of jurisdiction based solely on universality). Of particular relevance to the present case, it does not appear that there is any broad-based universal jurisdiction practice in national courts (a) for purely civil rather than criminal claims; (b) with respect to non-resident corporations or, with some exceptions, non-resident individuals; or (c) involving secondary rather than primary liability.[6]

Moreover, recent international trends in criminal enforcement of universal offenses indicate substantial caution. As noted, in response to protests of the United States and other nations, Belgium modified its universal jurisdiction law to apply only to Belgian citizens or Belgian residents as defendants and to eliminate the ability of private persons to initiate a proceeding. *See* Langer, *The Diplomacy of Universal Jurisdiction*, 105 Am. J. Int'l L. at 30-31. *See also id.* at 11-26 (discussing cautious approach to criminal universal jurisdiction prosecutions in Germany, France, and England); *id.* at 25-26 (noting in connection with new French legislation enacted in 2010 that "the French legislature was willing to expand French

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[6] *See* Supplemental Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners (*Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, filed June 13, 2012), at 28-40 (purporting comprehensively to identify instances of similar litigation in foreign jurisdictions, but in fact appearing to find no cases analogous to the present one); Supplemental Brief for Respondents, at 45-46 (demonstrating that foreign court cases cited by Petitioner are not analogous to the present case).

courts' universal jurisdiction over these crimes only under highly restrictive conditions and by giving the Executive Branch more control over such prosecutions"); *id.* at 37-50 (noting new limits imposed by statute in Spain in 2009); *Recent Legislation*, 125 Harv. L. Rev. 1554, 1554-55 (2012) (describing recent United Kingdom legislation eliminating the ability of private parties to bring criminal complaints under universal jurisdiction, and noting a "trend of states' ... tightening universal jurisdiction legislation to respond to the unique challenges and international relations implications these prosecutions present.").[7]

Again, this is not to argue that the United States should not assert universal jurisdiction in some cases, but rather to say that U.S. courts should do so only in conjunction with Congress and the Executive Branch. Adopting universal jurisdiction under the ATS would in contrast place U.S. courts far ahead of, and significantly in conflict with, Congress and the Executive Branch. *Cf. Sosa*, 542 U.S. at 727 (finding that the foreign relations consequences of ATS claims

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[7] The International Criminal Court (ICC), a tribunal created by treaty among over 100 nations to prosecute genocide, war crimes, crimes against humanity and aggression, also does not exercise universal jurisdiction. *See* Rome Statute of the International Criminal Court, Arts. 12-13, 2187 U.N.T.S. 90 (July 17, 1998, entered into force July 1, 2002) (providing for jurisdiction only where a national of a party to the treaty is a defendant, the offense is alleged to have occurred in the territory of a party to the treaty, or a matter is referred by the United Nations Security Council). Although during the drafting process it was proposed to grant the tribunal universal jurisdiction, that proposal was not adopted, including due to opposition by the United States. *See The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* 136 (Roy S. Lee ed. 1999).

"should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"); *Rio Tinto*, 671 F.3d at 815-16 (Kleinfeld, J., dissenting) ("The political branches may choose to take no action against terrible evils ... These political decisions are not pretty, but they are integral part of the management of foreign affairs, and this task is for good reason not assigned to the judiciary.").

III. Extending ATS Jurisdiction to Acts of Non-U.S. Persons in Foreign Sovereign Territory Would Be Contrary to the ATS's Purpose and beyond the Common Understanding of Its Scope at the Time It Was Enacted

A. Congress' Purpose in Enacting the ATS Did Not Include Providing Jurisdiction over the Acts of Non-U.S. Persons in Foreign Sovereign Territory

As this Court described in *Sosa*, 542 U.S. at 715-20, the purpose of the ATS was to provide a remedy for international wrongs for which the United States would be held responsible by foreign nations and thus to protect the foreign relations of the United States. *See id.* at 715 (noting that it was a "narrow set of violations . . . threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS").

The 18th century law of nations made a country responsible for certain wrongful acts of its nationals or which occurred in its territory. Nations had an international obligation to prevent these wrongs and to remedy them if they occurred. *See* Anthony J.

Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445 (2011); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830 (2006); *Rio Tinto*, 671 F.3d at 800-02 (Kleinfeld, J., dissenting); *id.* at 824-26 (Ikuta, J., dissenting). Under this system, individuals' violations of the law of nations plagued U.S. foreign relations under the Articles of Confederation. The best known was the 1784 assault on the French diplomat Francois Barbé-Marbois in Philadelphia, which prompted a strong diplomatic protest by France, the most important U.S. ally. *See Respublica v. De Longchamps*, 1 Dall. 111 (O.T. Phila. 1784); *Sosa*, 542 U.S. at 716-17. James Madison's influential 1787 essay "Vices of the Political System of Government in the United States" highlighted the Confederation's inability to enforce treaties and the law of nations. *See* 9 *Papers of James Madison* 348-49 (William Hutchinson, et al., eds., 1962-91). Later that year, Virginia governor Edmund Randolph opened the Philadelphia Convention by listing the Articles' problems; a leading one was that the nation could not "cause infractions of treaties or the law of nations, to be punished." 1 *Records of the Federal Convention of 1787*, at 19 (Max Farand, ed., 1911). And shortly after ratification of the new Constitution, fears of disastrous repercussions from law-of-nations violations were almost realized. In the renewed conflict between Britain and France in 1793, U.S. citizens joined French military efforts, and these violations of U.S. neutrality – which the British called infringements of the law of nations – threatened to bring the United States into war with Britain. *See generally* William Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail* (2006).

Although these wrongs were committed by private persons, they triggered international responsibilities to other nations on the part of the United States. Thus when Charles de Longchamps (a French citizen) assaulted Marbois in Philadelphia, France complained that this was a violation of international law for which the United States was responsible and which the United States had a duty to remedy – a serious problem for the Confederation government, which lacked power to do anything to de Longchamps. *See Sosa*, 542 U.S. at 716-17. Similarly, when U.S. citizens attacked British and Spanish ships during peacetime or joined France's fight against Britain in the 1790s, these acts placed the United States under an international duty to remedy them, and foreign nations whose citizens had been injured aggressively asserted their rights against the United States.

The threats posed to the United States in this system were substantial. The nation in 1789 had no navy and a tiny army tied down by rising hostility along the western frontier. State militias had proved disorganized and unreliable even in minor operations. The United States faced powerful potential adversaries, three of which (Britain, France, and Spain) had bases in North America and the ability to project force around the globe. Britain retained a string of forts within U.S. territory along the northern frontier which it had promised to give up but then refused to do so (and the United States was too weak to force the issue). More fundamentally, the United States occupied a precarious position in the 18th century political world. There was no guarantee that the powerful European monarchies would treat it as a co-equal sovereign entitled to the rights of international law and diplomacy, rather than a

rebellious and anarchic region available for conquest and annexation. Worse, 18th century international relations were preoccupied with national rights and national honor, and were characterized by quick resort to force, pillage, and conquest. International rights were not just a subject of diplomatic protest; they were enforced by warships and armies. *See* Frederick Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 3-95 (1997) (discussing foreign affairs challenges under the Articles of Confederation).

In sum, the United States in 1789 was not worried about violations of the law of nations in the abstract. It was worried about the very real threat that individuals for whom it was responsible would bring down the diplomatic and military wrath of powerful nations by infringing those nations' international rights. The ATS – along with laws such as the 1790 Crimes Act, 1 Stat. 113-14, 118 (criminalizing piracy, assaults on ambassadors, and violations of safe conducts), and the 1794 Neutrality Act, 1 Stat. 381 (criminalizing violations of neutrality by U.S. citizens) – was a defensive measure, designed to stem the sort of international offense that had occurred under the Articles. If an alien was injured in a situation where the United States would be held responsible by foreign nations, the United States could point to the ATS as providing a remedy (and thus satisfying the U.S. obligation to redress the violation).

This design is demonstrated by the most significant ATS-related episode in the decade after its enactment. In 1794, U.S. citizens joined a French naval attack on the British colony of Sierra Leone. In keeping with the 18th century practice of interna-

tional law outlined above, Britain protested to the U.S. government and demanded a remedy: Britain and the United States were at peace, so the U.S. citizens' actions violated the international law of neutrality (as well as the 1783 Treaty of Peace), and Britain held the U.S. government responsible. To deflect the British complaint, U.S. Secretary of State Randolph sought to show that the United States would provide a remedy for the violation. At his request, Attorney General William Bradford in 1795 wrote an opinion saying, among other things, that the ATS allowed British citizens to sue in U.S. courts for injuries caused by U.S. citizens' breach of neutrality. *See* Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795); *Sosa*, 542 U.S. at 721.

Claims involving the actions of non-U.S. persons in foreign countries with no connection to the United States[8] are far from (and indeed contradict) the purposes for which the ATS was adopted. This remains true even if claims without a U.S. nexus are limited to universal jurisdiction wrongs. First, as a

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[8] *Amicus* does not take a position on what connection with the United States should be required for ATS jurisdiction, except that at minimum it should be sufficient to make the United States plausibly associated with the person's conduct. A connection beyond citizenship or territory might be sufficient, such as residency, see *Filartiga v. Pena-Irala*, or acting as an agent of the U.S. government, see *Sosa*. *See Ali Shafi v. Palestinian Authority*, 642 F.3d 1088, 1100 (D.C. Cir. 2011) (Williams, J., concurring) (suggesting, on the basis of the ATS's historical concerns, that ATS jurisdiction would be appropriate in cases against alien defendants "if the foreign perpetrator were linked to the United States by residence or by some other feature such that American disregard of the offense might cause serious blame to fall on the United States."). These circumstances are not presented and need not be decided here, as the claims involve only the acts of a non-resident corporation.

general matter, the United States has no international responsibility for activities lacking any connection with its citizens or territory, nor would foreign nations expect or demand the United States to provide a remedy for them.[9] While there may be particular treaties that obligate actions with regard to individuals present in the United States under certain circumstances, there is no suggestion here that the United States has any duty to allow private claims (or take other action) against non-resident corporations, and it remains unclear whether claims of this type would proceed in any other jurisdiction; in any event, there is no consensus in favor even of allowing them, much less of requiring them. *See* 3 International Commission of Jurists, *Corporate Complicity and Legal Accountability: Civil Remedies* 6 (2008) (terming U.S. approach to corporate liability under the ATS "unique").

Second, for the United States to claim authority over the activities of non-U.S. entities in foreign sovereign territory would exacerbate, not mitigate, international tensions. Again, this concern is not eliminated by limiting such claims to universal offenses. As discussed in Part I above, claims involving universal offenses often present substantial

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[9] The concept of universal jurisdiction under customary international law "authorizes, or at least does not prohibit, the exercise of universal jurisdiction over the core international crimes." Langer, *The Diplomacy of Universal Jurisdiction*, 105 Amer. J. Int'l L. at 4; thus, in its ordinary application it (like other bases of jurisdiction) is discretionary. *See id.* *See also United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (declining to read a broadly worded statute criminalizing piracy to reach acts without any nexus to the United States because Congress is presumed to be concerned with "offences against the United States" rather than universal jurisdiction offenses).

issues of definition, fact-finding, scope of liability, and remedy. Moreover, precisely because they involve allegations of the most heinous wrongdoing, their disposition is especially sensitive. The purpose of the ATS – to shield the United States from potentially hostile international reactions – is directly contradicted by embracing ATS jurisdiction for claims lacking a U.S. nexus, even in the presence of universal jurisdiction.

B. The Scope of the ATS at the Time It Was Enacted Would Not Have Encompassed Acts of Non-U.S. Persons in Foreign Sovereign Territory

Consistent with the purpose described above, in enacting the ATS, Congress would not have thought it was authorizing U.S. courts to hear claims arising in foreign territory with no connection to the United States. In the first place, the law of nations at that time did not recognize any ability of a nation to punish conduct in foreign sovereign territory other than the conduct of its own nationals. *See* Emmerich de Vattel, *The Law of Nations*, bk. II, at 154-56 (J. Chitty ed. 1883) (1758). While there was criminal universal jurisdiction over piracy, piracy was the only universal jurisdiction crime recognized at the time; by definition it occurred only on the high seas and not in the territory of any sovereign. *See* Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149, 165-66 (2009); *Rio Tinto*, 671 F.3d at 813 (Kleinfeld, J., dissenting). Thus it did not raise the potential conflicts with foreign nations that would

attend attempts to punish conduct occurring within another sovereign's territory.[10]

Moreover, Article III of the U.S. Constitution was not understood in 1789 to provide jurisdiction over common law suits between aliens in the circumstances presented here, and the ATS would have been construed accordingly. In *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800), this Court construed the 1789 Judiciary Act's grant of jurisdiction "where ... an alien is a party" to conform to Article III limits, and thus to preclude jurisdiction over suits involving only aliens. Similarly, the ATS (a part of the same Act) would not have been construed to exceed Article III limits as then understood, and pursuant to *Mossman*, it could not have reached alien-against-alien suits as a matter of diversity jurisdiction. *See Rio Tinto*, 671 F.3d at 829-34 (Ikuta, J., dissenting). While some alien-against-alien claims would fall within ambassadorial or admiralty jurisdiction, for the type of claims presented here the only Article III possibility is that they "aris[e] under ... the Laws of the United States." *See* U.S. Const., Art. III, Sec. 2.

It may be the case that *some* parts of international law – as applied in U.S. territory or to U.S. residents, officers, and agents, for example – were considered "Laws of the United States" in 1789. *See The Paquete Habana*, 175 U.S. 677 (1900) (finding that, in case involving actions of U.S. officers, international law is "part of our law"); *Sosa*, 542 U.S. 692 (entertaining and rejecting ATS claims against a non-citizen

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[10] Even with respect to piracy, this Court presumed that Congress did not intend to exercise universal jurisdiction (that is, to reach acts with no connection to the United States) unless Congress stated its intent clearly. *Palmer*, 16 U.S. at 631.

U.S. agent without considering jurisdictional issues). However, it is improbable that anyone in the founding era thought the international laws governing non-U.S. entities in foreign sovereign territory were "Laws of the United States." *See Palmer*, 16 U.S. at 631 (in the context of piracy, contrasting "offences against the United States" and "offences against the human race"). The 18th century understanding of a sovereign's jurisdiction was highly territorial, with the exception of the conduct of nationals abroad. Even if courts might sometimes adjudicate common law claims lacking a U.S. nexus, they would not have been thought to be applying law *of the United States.*[11] Accordingly, despite the statute's general

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[11] As this Court held in *Sosa*, the ATS did not create a statutory cause of action, but instead authorized U.S. courts to hear certain types of common law claims. Prior to *Erie RR. Co. v. Tompkins*, 304 U.S. 64 (1938), the law of nations as applied by federal courts was understood as "general" common law. *See Sosa*, 542 U.S. at 739-42 (Scalia, J., concurring in part and concurring in the judgment). The mere fact that federal courts recognized a cause of action (as it would be put in modern terms) under general common law did not establish federal jurisdiction under Article III. *Id.* Thus, as to common law claims arising from conduct with no connection with the United States, it seems implausible that Congress in 1789 would have thought of them as laws of the United States in the Article III sense.

Notably, adopting this view of the ATS does not require inquiry into the effect of *Erie* and related cases, which abolished "general" common law and recognized a limited form of federal common law. After *Erie*, at least some common law actions created by federal courts convey federal jurisdiction as "Laws of the United States," see *Illinois v. Milwaukee*, 406 U.S. 91, 100 (1972); how this affects claims for violations of international law is unclear. *See International Law in the U.S. Supreme Court: Continuity and Change* 243-56 (David Sloss *et al.*, eds., 2011) (discussing potential effects of *Erie*). The only question here, however, is how the First Congress understood the jurisdictional

language, at the time of its enactment, the ATS would not have been construed to convey jurisdiction over the acts of non-U.S. persons in foreign sovereign territory – a limit wholly consistent with its purpose.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully encourages this Court not to find ATS jurisdiction over the acts of non-U.S. persons in foreign sovereign territory, even where universal jurisdiction is alleged.

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grant of the ATS. Because the ATS was enacted long before *Erie*, on an entirely different understanding of common law jurisdiction, its enactors would not have thought Article III jurisdiction arose merely because federal courts were applying common law. Thus it is appropriate to construe the ATS to contain this limit upon its scope. *See Rio Tinto*, 671 F.3d at 829-34 (Ikuta, J., dissenting).